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IN THE

Supreme Court of The United States

OCTOBER TERM, 1978

No. 78-188

MELLON BANK, N.A.,
Petitioner,

v.

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

And

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.
Respondents.

REPLY BRIEF OF PETITIONER IN RESPONSE TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

CHARLES W. KNOWLTON
OF COUNSEL
FRANCIS P. MOOD
HAMILTON OSBORNE, JR.

BOYD, KNOWLTON, TATE & FINLAY
12th Floor, SCN Center
1122 Lady Street
Columbia, South Carolina 29201
(803) 779-3080
Counsel for Petitioner

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Petitioner, Mellon Bank, N.A., submits to the Court its reply to the two separate briefs filed by each respondent in opposition to the petition for a writ of certiorari.

ARGUMENT

1. The decision of the Court of Common Pleas of Sumter County and the decisions of the Supreme Court of South Carolina do not rest upon adequate and independent state grounds.

Both the trial court and the Supreme Court of South Carolina asserted venue and jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute, South Carolina Code §36-2-803 (1976), in a transitory cause of action. This flies in the face of the venue and jurisdiction provisions of the National Bank Act, 12 U.S.C. § 94 and also in conflict with 28 U.S.C. § 1348. Jurisdiction was challenged by petitioner by special appearances at the outset (Mellon's App. pp 24-25). In sum, the South Carolina Courts at every level lacked jurisdiction over this petitioner and everything that transpired in those courts is a nullity.

After the Court of Common Pleas confirmed jurisdiction over Mellon an appeal was commenced by the Bank to the Supreme Court of South Carolina. Mellon served its proposed case and exceptions on counsel for Associates within the required time limit, but through the inadvertence of the then counsel for Mellon Bank, service was made on Southland several days late. Thus, the South Carolina Supreme Court concluded that the appeal as to Southland would not be heard. However, the issue before both the trial court and the South Carolina Supreme Court was the jurisdiction of the courts of this state over Mellon Bank in this single lawsuit. The fact that Mellon Bank's proposed case and exceptions were not timely served on one party should make no difference in the granting of this petition for a Writ of Certiorari. Pursuant to specific provisions of federal statutes, there never was any South Carolina judicial jurisdiction over Mellon Bank at any level.

The decisions cited by respondent Southland in its brief in opposition have no application here. We are mindful of the decision in *Herb vs. Pitcairn,* 324 U.S. 117 (1945). There a plaintiff brought an FELA action in a city court which the Supreme Court of Illinois held to be without jurisdiction although jurisdiction would have been proper in other courts of that state. In this Court the plaintiff attempted to assert the argument that the judgment rested upon an erroneously decided federal ground. This Court held that the judgment rested upon an adequate and independent state ground. The Court went on to say in the passage quoted on page 2 of Southland's Brief in Opposition:

> ". . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . ."

324 U.S. at pages 125-126. This is exactly what we are asserting here. Both the trial court and the State Supreme Court of South Carolina incorrectly adjudged federal rights by making the state long-arm statute paramount to federal venue and jurisdiction statutes. This Court in *Pitcairn* went on to clarify the doctrine at 324 U.S. 128 as follows:

> "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record. *But because we will not proceed with a review while our jurisdiction is conjectural it does not follow that we should not take steps to protect our jurisdiction when we are given reasonable grounds to believe it exists. . .*" (emphasis added)

Our position here is the very simple proposition that the state courts in South Carolina at any level could not have properly asserted jurisdiction over this petitioner, For them to assert otherwise in direct conflict with federal statutes cannot possibly constitute "adequate state grounds."

2. The decisions of the Supreme Court of South Carolina and the Court of Common Pleas for Sumter Court were clearly erroneous in holding that petitioner was operating a branch bank in Sumter County.

The McFadden Act at 12 U.S.C. § 36(c) does not permit a national bank to establish a branch other than within the state in which the bank is headquartered. National banks frequently purchase commercial paper from sources in other states through agents or otherwise. They also enter into participation agreements on construction mortgage loans with banks in other states. In this country there are financial centers in large cities which in effect export capital through these means, and it is a fact of life in a small state like South Carolina that capital must be imported from national banks in other states through these means. It is contrary to the realities of the financial world and the intent of the McFadden Act to hold that such activities constitute branch banking in other states. In the case at bar, the initial credit was extended to purchasers from Southland by Southland. The installment obligations were then assigned and sold to Mellon Bank via Associates. There was no money advanced by Mellon Bank to the original obligors. It was, in essence, the identical operation before this Court in *Michigan National Bank v. Robertson,* 372 U.S. 591 (1963). In *Robertson* apparently no issue was raised about branch banking, but the Court clearly held that the Michigan bank could not be sued in Nebraska under the Nebraska usury laws because of the clear provisions of 12 U.S.C. § 94.

In its brief, Associates cites *Independent Bankers Association of Georgia vs. Board of Governors of the Federal Reserve System,* 516 F 2d 1206 (D.C. Cir. 1975). In essence, the Court of Appeals for the District of Columbia did not make a final decision on the merits and simply remanded the matter for adjudication by the Federal Reserve Board. The question raised in that case was whether a mortgage loan company in Georgia constituted a branch of a bank which was owned by the same holding company in Georgia. This case has no relevance here. There is no corporate relationship between Mellon Bank and Associates or Mellon Bank and Southland.

The *Whitney* case also cited by Associates involves some corporate relationships and banking activities, all of which took place within the State of Louisiana. The Court of Appeals for the District of Columbia held that an affiliated corporation constituted a branch of another banking corporation. The Supreme Court simply held that the controversy could not be decided without further consideration by the Federal Reserve Board and remanded the case for that purpose. *Whitney National Bank v. Bank of New Orleans,* 323 F. 2d 290 (D.C. Cir. 1963), rev'd. 379 U.S. 411 (1965).

3. The question of whether Mellon Bank waived its immunity from suit in South Carolina is properly before this Court.

While it is true that the Supreme Court of South Carolina decisions are silent on the question of waiver, by implication it made such a decision by affirming the decision of the Court of Common Pleas for Sumter County. As pointed out in our petition, the Court of Common Pleas for Sumter County erroneously held that Mellon Bank had waived its immunity (Mellon's App. p. 29). As we argued previously, there was on basis for holding that there was a waiver. Throughout this litigation, Mellon Bank has specifically contested jurisdiction and has done nothing to voluntarily submit itself to the jurisdiction of South Carolina courts. To assert that Mellon Bank, by conduct prior to the inception of this law suit, could waive jurisdiction is to create a substitute standard for that provided for in 12 U.S.C. § 94.

CONCLUSION

WHEREFORE, for the additional reasons set forth herein, petitioner submits that a Writ of Certiorari should be granted.

CHARLES W. KNOWLTON
OF COUNSEL

FRANCIS P. MOOD

HAMILTON OSBORNE, JR.

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1122 Lady Street
Columbia, South Carolina 29201
(803) 779-3080

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